

State of Minnesota

County of Hennepin

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BY: PROBATE/MENTAL HEALTH
FOURTH DISTRICT COURT

District Court
Probate Division

Judicial District: Fourth

Court File No. 27-GC-PR-111-16

In Re: Emergency Guardianship of

Albert N. Barnes,
Respondent

Order Appointing Emergency Guardian

This matter came on for hearing on February 2, 2011 before the District Court on a petition seeking an emergency appointment of a guardian for the Respondent named above. The matter, having been considered by the Court and the Court being duly advised in the premises now makes the following:

FINDINGS OF FACT

1. This matter is before the Court pursuant to a petition filed by Luther Amundson, counsel for Methodist Hospital, on January 14, 2011, requesting appointment of Alternate Decision Makers, Inc. as emergency guardian of Albert N. Barnes, the respondent. The January 14, 2011 petition alleged that Lana Barnes, who is Mr. Barnes' wife, was an inappropriate person to handle Mr. Barnes' affairs because she was demanding inappropriate and possible harmful medical treatment for him.
2. Based on information contained in the petition, this Court issued an *ex parte* order appointing an emergency guardian on January 14, 2011. A hearing was held on January 19, 2011, within the five day period required upon issuance of an *ex parte* order appointing an emergency guardian.
3. At the time of the January 19 hearing, the parties agreed to continue the hearing on the emergency guardianship to February 2, 2011 to allow time for review of medical records. The Court ordered that the guardian

take necessary and reasonable measures to preserve Mr. Barnes' life, including provision of dialysis treatment.

4. Pursuant to motion and agreement of the parties, an interim hearing was held on January 24, 2011 to address the extent of the powers granted the emergency guardian.
5. Lana Barnes, the Respondent's spouse (hereafter Mrs. Barnes), opposes the appointment of Alternate Decision Makers, Inc. as emergency guardian. She requests that if an emergency guardian is appointed, that she be appointed.
6. Based on the evidence before the Court, the Court finds that Respondent's needs for health, safety, or welfare are at risk for the following reasons:

Albert Barnes (hereafter Mr. Barnes) suffers from advanced dementia, renal failure, chronic respiratory failure, and chronic pleural effusion. He currently shows no response to outside stimuli, and is unable to communicate or respond in any manner. Mr. Barnes is dependent on a ventilator for breathing and is tube fed. He suffers from recurrent pneumonia and infections. Due to his complete inability to make decisions and inability to communicate, Mr. Barnes is in immediate need of a guardian to give necessary consent and make decisions on his behalf.

The Court makes the above findings notwithstanding Mrs. Barnes' adamant and sincere belief that her husband has been consistently misdiagnosed as having complications from untreated Lyme's Disease. Mrs. Barnes believes that Mr. Barnes can recover from his debilitated condition through "proper" medical treatment.

The evidence before the Court overwhelmingly establishes that Mr. Barnes' regrettable condition is not reversible. He is dying, slowly and painfully. The evidence before the Court establishes that no amount of medical care and treatment is going to change that.

7. As is required for the appointment of an emergency guardian, the Court finds that compliance with the procedures for appointment of a general guardian will likely result in substantial harm to Mr. Barnes' health, safety, or welfare. That harm would come from the continued imposition on Mr. Barnes of inappropriate, unnecessary and often harmful and painful medical treatments.
8. Mrs. Barnes requests that she be appointed guardian for Mr. Barnes if anyone is. This Court finds that Mrs. Barnes should not act as guardian for Mr. Barnes a number of reasons:

One fact that supports this conclusion is that Mrs. Barnes has misrepresented herself as the health care agent for Mr. Barnes. It is true that on June 10, 1993, Mr. Barnes executed a health care directive briefly appointing Mrs. Barnes as his primary health care agent. However, on July 18, 1994, through the same attorney who prepared the 1993 health care directive, Mr. Barnes *revoked* the 1993 health care directive. Instead of allowing his wife to remain as his health care agent, the 1994 health care directive appoints James Barnes as health care agent. Despite the revocation of her appointment as health care agent, Mrs. Barnes has continued to hold herself out as Mr. Barnes' duly appointed health care agent. It is likely that Mrs. Barnes knew of this but chose not to disclose it.

More troublesome is that Mrs. Barnes has been deceptive to the Court and to others about the content of both of Mr. Barnes' health care directives. Specifically, Mrs. Barnes provided only the last page of the 1993 health care directive to health care providers, which was the page that reflected her one-time appointment as her husband's health care agent. She did not provide the 1994 health care directive to the health care providers.

What is especially telling is that the pages that Mrs. Barnes omitted contained explicit instructions about end-of-life care that Mr. Barnes included in both the 1993 and 1994 health care directives. The two pages from each health care directive that Mrs. Barnes failed to produce contain explicit instructions from Mr. Barnes about his wishes with

respect to end-of-life care, which is at the core of this dispute. Specifically, Mr. Barnes stated:

(1) If at such time there is not reasonable expectation of my recovery from extreme physical and mental disability, I direct that I be allowed to die and not to be kept alive by medications, artificial means or "heroic measures."

...

(5) I particularly do not want the following kinds of life-sustaining treatment if I am diagnosed to have a terminal condition ...

(a) electric or mechanical resuscitation of my heart;

(b) nasal gastric tube feeding when I am no longer able to swallow;

(c) mechanical respiration when my brain can no longer sustain my own breathing.

(6) I recognize that if I reject artificially administered sustenance, then I may die of dehydration or malnutrition rather than from my illness or injury. The following are my feelings and wishes regarding artificially administered sustenance should I have a terminal condition...

I do not wish to have artificially administered sustenance if I have a terminal condition. I believe that one should be permitted to die with dignity and that to prolong life by artificial means when one is in a terminal condition is purposeless.

(Exhibit 101). Except for naming different health care agents, the first two pages of the 1993 and the 1994 health care directives are identical.

There is no evidence that Mr. Barnes executed any document that changed the end-of-life wishes.

Mrs. Barnes maintains that Mr. Barnes told her that he wanted to be given all treatment available to maintain his life. Mrs. Barnes further maintains that this statement of Mr. Barnes effectively revoked the health care directive. There is no supporting evidence of any such statement by Mr. Barnes. And, there is no evidence that such a statement was made in compliance with Minnesota Statute 145C.09 which governs revocation of a health care directive. Given the multitude of hospitals that have treated Mr. Barnes over a period of many years, it is more likely than not that a revocation of the health care directive would have been documented if there was a revocation.

Beyond what is identified above, Mrs. Barnes has not acted in the best interest of Mr. Barnes and has failed to appropriately advocate for Mr. Barnes. For instance, acting as a purported health care agent, Mrs. Barnes requested 78 emergency transfers of Mr. Barnes. She had Mr. Barnes admitted to at least ten hospitals in the Twin Cities metro area since 2008, including at least eight different hospitals since March 2010. Mrs. Barnes continues to demand unnecessary, inappropriate, and in some cases harmful testing and treatment for Mr. Barnes. Mrs. Barnes has refused all attempts to have Mr. Barnes discharged to a more appropriate setting than inpatient hospitalization.

Furthermore, by order of the District Court, Chisago County, Minnesota, dated March 25, 2005, Mrs. Barnes was ordered to comply with all medical recommendations of Mr. Barnes' medical treatment team regarding his continuing care and treatment. Mrs. Barnes has repeatedly failed to comply with the medical recommendations from the medical treatment teams and medical professionals from almost every major hospital in the Twin cities metro area. As a result, Mr. Barnes has been transported from hospital to hospital for several years and has failed to receive a continuum of consistent medical care in an appropriate setting, exposing him to unnecessary medical risks.

9. Given Mr. Barnes' debilitated condition, no alternative that is less restrictive of his civil rights and liberties exists, including the use of appropriate technological assistance.
10. The Court finds that Alternate Decision Makers, Inc., the Guardian appointed by this order, is the most suitable and best qualified among those available and willing to discharge the trust and is not excluded from appointment pursuant to M.S. § 524.5-309(c). Alternate Decision Makers, Inc., is experienced in handling these types of matters and is ready, willing and able to accept responsibility for Mr. Barnes.

CONCLUSIONS OF LAW

1. The Respondent will likely suffer from substantial harm if an emergency guardian is not appointed.
2. Mrs. Barnes is not the most suitable and best qualified person to serve as emergency guardian for the respondent.
3. Alternate Decision Makers, Inc. is the most suitable and best qualified among those available and willing to serve as emergency guardian for the respondent and is not excluded from appointment pursuant to M.S. § 524.5-309(c).

ORDER

NOW, THEREFORE, IT IS ORDERED:

1. Alternate Decision Makers, Inc. is hereby appointed Guardian of Respondent.
2. **The Guardian shall have the power and duty to:**
Exercise the rights and powers on behalf of the Ward under M.S. § 524.5-313(c) paragraphs 1, 2, 4, 5, 6 and 7 as follows:

Have custody of the Ward and establish the place of abode for the Ward within or without the State, M.S. § 524.5-313(c)(1);

Provide for the Ward's care, comfort and maintenance needs, M.S. § 524.5-313(c)(2);

Give any necessary consent to enable, or to withhold consent for, the Ward to receive necessary medical or other professional care, counsel, treatment or service, M.S. § 524.5-313(c)(4);

Approve or withhold approval of any contract, except for necessities, which the Ward may make or wish to make, M.S. § 524.5-313(c)(5);

Exercise supervision authority over the Ward, M.S. § 524.5-313(c)(6);

Apply on behalf of the Ward for any assistance, services, or benefits available to the Ward through any unit of government, M.S. § 524.5-313(c)(7).

3. Amended Letters of Emergency Guardianship shall issue to Alternate Decision Makers, Inc.; and such letters shall reflect the expiration date for the appointment.
4. The appointment under this Order shall terminate on March 14, 2011.
5. This order supersedes and replaces all previous orders appointing and amending appointment of an emergency guardian in this proceeding. This Order specifically eliminates the requirement that Mr. Barnes be given dialysis. The emergency guardian may proceed according to the powers and duties provided by Minnesota law, with proper consideration given to the facts and circumstances including the expression of Mr. Barnes' wishes as incorporated into his health care directive and as otherwise expressed.

February 4, 2011
Date

Order Recommended by:

Dean Maus
Dean M. Maus
District Court Referee

Review of a Referee's Order

It is confusing to many that one judge in a black robe heard Mr. Barnes' case, and that another judge seems to be involved in the case by reviewing and signing off on the first judge's order. To clarify this confusion for those who are unfamiliar with this process, a brief explanation is in order: Under Minnesota Statute Section 484.70, a person known as a referee may be appointed to assist a judge in the handling of certain types of cases. Referees who are appointed are generally experts in the particular subject area. The referee in this case, Dean Maus, fits the characterization of an expert: He has practiced in probate law for over 26 years, and he has been a Probate Court referee for over 10 years. He is one of the state's most knowledgeable experts in all areas of probate law.

The referee's duty is to hear the case just as a district court judge would, and then prepare a recommended order. The recommended order is based on the facts the referee finds to be true and the law that applies to that factual scenario. The order becomes a final order of the Court when the appropriate district court judge (me in this case) reviews the order and confirms it.

This memorandum explains why I believe Referee Maus' recommended findings of fact are fully supported by the record and why his proposed order is just and reasonable under the circumstances.

Referee Maus' Recommended Findings of Fact and Proposed Order

The record reveals that there were three main points of contention in the proceedings that have just concluded: 1) The nature of Mr. Barnes' medical condition; 2) The person or entity most appropriate to appoint as the Guardian for Mr. Barnes; and 3) The appropriate course of action given Mr. Barnes' medical condition and his wishes.

1) The nature of Mr. Barnes' medical condition.

There were two clearly divergent views of Mr. Barnes' medical condition. On the one hand, medical professionals believe that Mr. Barnes regrettably suffers from multiple maladies that have brought him to the end of his natural life, and for which there is no cure or treatment. In contrast, Mrs. Barnes clings to the belief that Mr. Barnes is the victim of chronic misdiagnosis. Instead of being terminally and irreversibly ill, Mrs. Barnes believes that her husband suffers from complications of untreated, but treatable, Lymes' Disease.

It is apparent from the record and from his recommended findings that Referee Maus reviewed carefully the evidence presented by both sides. It is equally apparent that he correctly concluded that the medical experts were right about his condition. Indeed, years of medical records from numerous reputable medical professionals consistently diagnose Mr. Barnes as having a terminal condition that leaves him unresponsive in any meaningful sense. Those records similarly support the conclusion that there is no hope of recovery. It is no doubt a depressing conclusion, but it is the one born out of the evidence.

The record is clear that Mrs. Barnes sincerely believes in her view of her husband's medical condition. But the record is equally clear that her love for her husband and desire for him to be healthy and vital have overwhelmed her ability to be objective. Mrs. Barnes' feelings have likewise overwhelmed her ability to accept the reality that her husband is not coming back. It is a harsh and tragic reality, but it is reality.

2) The person or entity most appropriate to appoint as the Guardian for Mr. Barnes.

Referee Maus also properly concluded that Mrs. Barnes is not the most

appropriate person to be named as Mr. Barnes' guardian. The reasons for that conclusion are well stated in his proposed findings of fact. They are also well supported by the evidence presented to him in these proceedings.

Two points deserve comment: a.) The nature of Mrs. Barnes' actions in deceiving the Court and others about the substance of Mr. Barnes' health care directive; and b.) the manner in which Mrs. Barnes addressed Mr. Barnes' medical condition.

a.) The nature of Mrs. Barnes' actions

Until Wednesday Mrs. Barnes presented her case as if Mr. Barnes held throughout his life an unwavering and unequivocal desire to have his life extended at all cost and under all circumstances. It appears that all the while she knew that to be untrue. Specifically, and as Referee Maus noted, Mrs. Barnes knew about one health care directive (and probably two) where Mr. Barnes expressed in a legally operative document that he would NOT want measures taken to extend his life if he were in what he is in now--a persistent and irreversible vegetative state. Yet she has carried on with the Court and with numerous medical professionals as if the relevant portion of those documents did not exist. Furthermore, Ms. Barnes manipulated the health care directives in a manner that enabled her to assume control over her husband's affairs when she knew it was not properly within her power to do so.

b.) The manner in which Mrs. Barnes has handled Mr. Barnes' medical condition

With respect to the manner in which Mrs. Barnes has addressed Mr. Barnes' medical condition, it appears that Referee Maus aptly concluded that Mrs. Barnes has been the driving force behind subjecting Mr. Barnes to an unbelievable number of unnecessary and inappropriate medical interventions. The number and type of unnecessary medical interventions that Mrs. Barnes has engineered over the years purportedly on behalf of Mr. Barnes is astounding. When you add those medical interventions to the fact that Mrs. Barnes has persistently disregarded the advice of medical professionals, it is appropriate to conclude that Mrs. Barnes has not acted in Mr. Barnes' best interests.

Under the circumstances one can see why Mrs. Barnes did what she did: She deeply loves her husband and desperately does not want him to leave. Unfortunately, desperation breeds dishonesty. Though Mrs. Barnes' purpose in deceiving the Court and others may have seemed noble to her, it is not acceptable to the Court. To appoint a person as guardian, the Court must first trust that person. Embedded within Referee Maus' decision is the conclusion that Mrs. Barnes cannot be trusted to be candid with the Court, candid with the medical professionals treating Mr. Barnes, or even candid with herself. That lack of trust can hardly be a foundation for allowing Mrs. Barnes to exercise guardianship authority over Mr. Barnes. It disqualifies her from being Mr. Barnes' guardian.

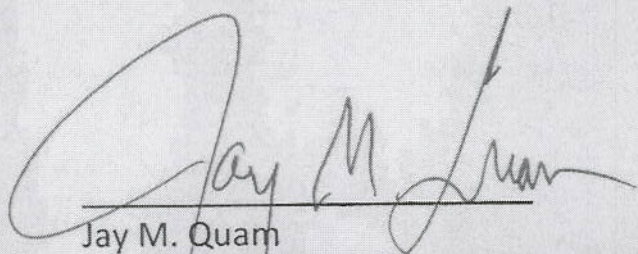
3) The appropriate course of action given Mr. Barnes' medical condition and express intent.

It is significant that Referee Maus recommends that the elimination of the requirement that Mr. Barnes continue to receive dialysis. As the record now stands, Referee Maus' recommendation is as it should be. The Court had been led to believe that Mr. Barnes' wishes were to be given all available medical treatment to sustain his life even if he were in a persistent vegetative state. The Court respected those apparent wishes in its earlier order by requiring that Mr. Barnes continue to receive dialysis.

Referee Maus discovered only Wednesday that Mr. Barnes had what appears to be a legally operative health care directive, and that his health care directive actually expressed his desire that steps NOT be taken to extend his life if he is found to be in a persistent vegetative state with no realistic chance of recovery. Needless to say, the Court is now far less confident that Mr. Barnes would wish to continue to undergo his dialysis (or any other life-extending treatment) when he has no chance of any meaningful recovery.

Under the laws of Minnesota, it is now within the guardian's duties and responsibilities to act on Mr. Barnes' behalf. The guardian must now consider all the facts and circumstances that relate to Mr. Barnes' medical condition and medical care, evaluate Mr. Barnes' wishes in light the health care directive and other evidence that bears on the issue, and act in the best interests of Mr. Barnes. If the guardian concludes that it is consistent with his express wishes and in Mr. Barnes' best interests to tell the medical professionals to

discontinue the dialysis and other life-sustaining measures, that is what the guardian must do. The Court will intervene in that process only if the matter is brought back before it.

A handwritten signature in black ink, appearing to read "Jay M. Quam". The signature is written over a horizontal line.

Jay M. Quam

Feb. 4, 2011

Presiding Judge of the Probate/Mental Health Court